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No. 90-1884

In The

Supreme Court of the United States

October Term, 1991

PRUDENTIAL INSURANCE COMPANY OF AMERICA,

Petitioner,

v.

BILLY W. BROWN,

Respondent.

Petition For A Writ Of Certiorari To The Texas Court Of Appeals For The Fourteenth Supreme Judicial District

BRIEF OF RESPONDENT, BILLY W. BROWN, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Respondent Billy W. Brown prays that the Petition be dismissed for want of jurisdiction. Alternatively, Respondent prays that the Court decline to issue a Writ of Certiorari to the Texas Fourteenth Court of Appeals.

OPINIONS BELOW

Petitioner has filed its Appendix with the Court pursuant to Supreme Court Rule 14(k). Petitioner's Appendix fails to comply with paragraph (i) of Rule 14(k), because it does not include the January 19, 1989 ruling of the Texas trial court on Petitioner's preemption claims. That

ruling was delivered from the bench after a *separate trial* on those issues.[1]

JURISDICTION

Pursuant to 28 U.S.C. § 1257, this Court does not have jurisdiction over Petitioner's claims since Petitioner failed to present to or obtain a decision from the highest Texas court in which review could be had of the federal questions it specially set up or claimed in the trial court.

STATUTES AND RULES INVOLVED

Title 28 of the United States Code, Section 1257, subsection (a) provides, in pertinent part:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari . . . where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

Title 29 of the Code of Federal Regulations, Part 2510, Section 3, subsection j, provides:

> For purposes of Title I of the Act [ERISA] and this chapter, the terms "employee welfare benefit plan" and "welfare plan" shall not include a group or group-type insurance program offered by an insurer to employees or members of an employee organization, under which
>
> (1) No contributions are made by an employer or employee organization;
>
> (2) Participation [sic] the program is completely voluntary for employees or members;

---

[1] The trial court's ruling from the bench on Petitioner's preemption claims is set forth on page 7, *infra*.

(3) The sole functions of the employer or employee organization with respect to the program are, without endorsing the program, to permit the insurer to publicize the program to employees or members, to collect premiums through payroll deductions or dues checkoffs and to remit them to the insurer; and

(4) The employer or employee organization receives nc consideration in the form of cash or otherwise in connection with the program, other than reasonable compensation, excluding any profit, for administrative services actually rendered in connection with payroll deductions or dues checkoffs.

Title 29 of the Code of Federal Regulations, Part 2510, Section 37, subsection (b)(2) provides, in pertinent part:

A plan is considered to be in existence if: (i)(A) The plan was reduced to writing and adopted by the participating employers and the employee organization. . . .

STATEMENT OF THE CASE

There are two threshold issues that the Court should determine before considering the merits of Petitioner's claims. First, the Court should determine whether any of Petitioner's claims are properly within its jurisdiction since the claims specially set up in the trial court were not pressed to or passed upon by the highest court of Texas in which review could be had. Secondly, the Court should determine whether it will consider evidence outside the record of the separate trial conducted on federal preemption questions – evidence that Petitioner apparently regards as necessary to sustain its arguments. These threshold issues are addressed in Parts I and II, below.

FACTUAL BACKGROUND

In June, 1981, Respondent Billy W. Brown ("Brown") sued Petitioner Prudential Insurance Company of America ("Petitioner") in a state district court in Harris County,

Texas. Brown's claims arose from Petitioner's refusal to pay for reasonable and necessary medical services and supplies used to combat Brown's prostate cancer. Petitioner raised no ERISA preemption claims whatsoever in reply to Respondent's suit. Rather, it demanded that he try his case to a jury under Texas law. (F. Supp. Tr., 38). In fact, Petitioner proceeded to trial solely upon state law issues without raising any ERISA preemption claims.[2]

Following rendition of a jury verdict in Petitioner's favor, it was discovered that an attorney had made improper communications to the jury foreman and surreptitiously supplied the jury with material previously ruled inadmissible by the Court. The trial court ruled that the attorney's unprofessional and improper conduct tainted the jury's verdict. He ordered that the case proceed to another jury trial on both issues of liability and damages. (F. Supp. Tr., 295).

In preparation for the re-trial before a newly appointed judge, the Hon. Alice O. Trevathan, Brown's attorneys sought the documents from Petitioner which constituted his claims file. The claims file had not been available to Brown at the previous trial. It was not until Brown's attorneys had secured a court order requiring production of those documents and awarding substantial monetary sanctions (S. Supp. Tr., 357)[3] that Petitioner's attorney finally released the documents. The contents of the claims file (PX 99) set the stage for a verdict much different than the one which followed the initial trial. At the same time that it was waging its ultimately unsuccessful battle to withhold Brown's claims file from him, Petitioner filed its Second Amended Answer. In this pleading, it claimed for the first time that Brown's claims were governed by ERISA, and thereby sought to avoid a re-trial at which it

---

[2] It is most ironic to find Petitioner now decrying all the proceedings below as "unnecessary litigation." (*See* Pet., pp. 17; 63).

[3] Petitioner's pleadings had already been stricken once before as a sanction for resisting discovery. (F. Supp. Tr., 73).

would have to confront the extraordinarily damaging documents.

Upon the motion of Petitioner (F. Supp. Tr., 983), the re-trial of the case was bifurcated. The first trial was to consist of a proceeding before Judge Trevathan, sitting without a jury. The second trial was to be held only in the event that the bench trial resulted in a ruling against Petitioner on its preemption claims, and was to be conducted before a jury solely upon Brown's claims.

The bench trial was conducted upon the claims appearing in Petitioner's Second Amended Answer. (Pet. App. G1-G11). These claims were substantially different than the claims Petitioner now seeks to urge upon this Court. As stated in its Second Amended Answer, Petitioner's claims were that:

(1) The International Garagemen's Association (the "IGA") was an association of *employees* (an "employee organization") which formed a multiple employer ERISA plan; and

(2) The Houston business where Brown worked ("Sonny's") was an "employer" within the meaning of ERISA, who allegedly established an individual ERISA plan by subscribing to the I.G.A. Insurance Trust.

(*Id.* G2-G9).

The "Separate Trial on ERISA Preemption" began as scheduled on January 17, 1989:

> THE COURT: Ms. Miles, we're now proceeding with a separate trial, and the separate trial is by agreement. All parties have signed off on the Order for Separate Trial to determine whether or not the case as plead by the Plaintiff is preempted by the ERISA statute and should be governed by federal law.
>
> All right. It is my understanding, if this is acceptable with you, Mr. Dyer, that you've agreed to go forward ___

> [MR. DYER, FOR PETITIONER]: *Your Honor, our proof on the subject of ERISA is short and sweet. It is limited,* at least as part of our opening presentation, *to the deposition of Jean Richey which was taken pursuant to a notice of deposition issued by the Plaintiff, Mr. Brown,* on July 21, 1987. We tendered that deposition in its entirety to the Court and would also offer into evidence each and all of the exhibits that were attached to the deposition.
>
> THE COURT: Do you have any objections, sir? . . .
>
> [MR. JOHNSON, FOR BROWN]: I have no objection, Your Honor.
>
> THE COURT: Movant Prudential's Exhibit 1, which is the deposition of Jean Richey and its attached exhibits, will be permitted.
>
> (Movant's Exhibit 1 admitted in evidence).
>
> MR. DYER: With respect to this in-limine hearing on the separate trial of ERISA preemption *Prudential rests.*

(Tr. Separate Trial on ERISA Preemption, Vol. I, pp. 5-8). (Emphasis added.) Thus, Petitioner rested its case in chief, having introduced *only* the deposition of Ms. Richey. However, Ms. Richey's testimony utterly negated the claim that the IGA was an "employee organization" since it established that individual employees could *not* join the organization. (Richey Depo., 34). Further, Ms. Richey's testimony failed to establish Petitioner's other claim that Sonny's had formed an individual ERISA plan. When Brown rested, Petitioner introduced no further evidence on rebuttal, and the Court then took the case under advisement. (Tr. Separate Trial on ERISA Preemption, Vol. I. p. 106).

On January 19, 1989, the Court again convened, and issued the following decision from the bench:

> THE COURT: 81-31687
>
> There was an agreed separate trial, non-jury on the issue of whether or not ERISA governs the trial of this cause and preempts state law.
>
> The Court has found that . . . Prudential Insurance Company's policy, which Mr. Brown, was

> the beneficiary, is not governed by – in this case we're proceeding under state law. *The Court is allowing both sides to submit proposed findings and conclusions.*
>
> The judgment of the Court is that this matter, this dispute will be governed under the applicable state law.
>
> Mr. Dyer understands now that the *remaining* issues in the case will proceed to trial. *It is the Court's determination that they will proceed to a jury trial because there was a demand for a jury.*

(*Id.*, Vol. II, pp. 112-13). (Emphasis added.)

As permitted by the trial court, Petitioner filed its proposal for entry of fact findings and conclusions of law. (Resp. App., A1 *et seq.*). In this proposal, Petitioner sought findings and conclusions to support two different theories: (1) that the IGA was an "employee organization" which formed a multiple employer plan, and (2) that the IGA was an "employer" who formed a plan.[4] Petitioner *did not request any findings or conclusions to support the claim that Sonny's formed an individual plan.* Obviously, Petitioner recognized that the evidence it introduced at the separate trial of preemption issues could not conceivably support any favorable findings or conclusions on this claim.

Brown's claims were tried between January 26 and February 20, 1989. At the conclusion of the trial, the jury was given written questions only upon Brown's claims, and answered those questions favorably to Brown. Since the trial judge had already tried and ruled upon Petitioner's preemption claims, no questions as to the factual elements of those claims were submitted to the jury.[5]

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[4] The trial court was not authorized to enter findings or conclusions on the latter claim, since Petitioner failed to raise it in its pleadings. Tex. R. Civ. P. 301.

[5] Despite the fact that Petitioner's ERISA preemption issues were tried in a prior separate trial, throughout its

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On April 3, 1989, the trial court entered a formal written judgment on Brown's claims. (Pet. App., B1-B16). The findings of fact and conclusions of law on Petitioner's preemption claims were not recited in the judgment, but were set forth in a separate document. (Pet. App. C1-C12). Under Texas law, Petitioner had ten days in which to file a request for entry of whatever additional or amended findings or conclusions that were necessary to support its pleaded claims that the IGA was an "employee organization" or that Sonny's was an "employer" which had formed an ERISA plan. Tex. R. Civ. P. 298. Petitioner filed *no* request for additional or amended findings. Instead it filed a "Motion for Judgment N.O.V." (Pet. App., H1 *et seq.*) in which it merely incorporated by reference the arguments raised in its previously filed proposal of findings and conclusions, i.e., that the IGA was either an "employee organization" or an "employer" which formed a multiple employer plan. By failing to file a request for additional or amended findings and conclusions supporting the claim that Sonny's formed an "individual" employer plan, Petitioner waived that claim in its entirety.[6] *Able v. Able*, 725

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Petition it cites this Court to testimony developed *at the trial of Brown's claims*. Petitioner's preemption claims were no longer at issue at that point, and the testimony at the later trial can have thus no bearing whatsoever on the claims. If – as Petitioner seems to suggest by citing to such testimony – its claims *were* at issue then, they were clearly waived. Petitioner concedes that under Texas law, a claim is waived unless there are *pleadings, proof,* and *findings* of the facts supporting that claim. (Pet., p. 61). Since no proof was put before the jury and no jury findings were sought or obtained on Petitioner's preemption claims, those claims were waived if still at issue at that point, pursuant to the very rule Petitioner cites. Tex. R. Civ. P. 279.

[6] Petitioner no longer bothers to venture the other argument that the IGA was an "employee organization" and in fact abandoned that claim in the trial court.

S.W.2d 778 (Tex. App. – Houston [14th Dist.] 1987, writ ref'd n.r.e.); *Pinnacle Homes Inc. v. R.C.L. Offshore Engineering Co.*, 640 S.W.2d 624 (Tex. App. – Houston [14th Dist.] 1982, writ ref'd n.r.e.). The trial court overruled Petitioner's "Motion for Judgment N.O.V.," and Petitioner appealed to the Texas Fourteenth Court of Appeals.

In its appeal to the Texas Fourteenth Court of Appeals, Petitioner made several strategic decisions which had a considerable impact upon the scope of appellate review there:

1. Petitioner predicated all of its appellate complaints regarding ERISA issues upon the trial court's rejection of its *Motion for Judgment N.O.V.* (in which it had argued only that the IGA was an "employee organization" or an "employer" which formed a multiple employer plan);
2. Petitioner abandoned the argument that the IGA was an "employee organization," and substituted in its place the contention, nowhere raised in its Second Amended Answer, that the IGA was an "employer;" and
3. Petitioner failed to challenge any of the trial court's fact findings.[7]

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[7] Under Texas law, findings of fact which have not been properly contested in the trial court *and* properly challenged by points of error on appeal are conclusively established. *Ervin v. Ervin*, 624 S.W.2d 264 (Tex. App. – Eastland 1981, writ dism'd); *Carter v. Carter*, 736 S.W.2d 775 (Tex. App. – Houston [14th Dist.] 1987, no writ). Petitioner failed to contest the fact findings in *either* the trial court *or* the Court of Appeals. Petitioner now misrepresents that it *did* challenge those finding. (Pet., p. 13). However, the very language Petitioner quotes from its state court brief (*See* Pet., p. 7) belies its claims. The first sentence in the quoted excerpt is explicitly directed to the trial court's *conclusions of law*. The second sentence in the quoted

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(*See* Appellant's Brief to the Texas Fourteenth Court of Appeals). After Respondent pointed out these matters to the Texas Fourteenth Court of Appeals in his responsive brief,[8] the Court of Appeals issued an unpublished opinion which carefully considered the undisputed fact findings in light of applicable case law, and properly rejected Petitioner's meritless appeal on the basis of those findings.[9]

When Petitioner sought review from the Texas Supreme Court, it once again changed its preemption claims. In its application for writ of error, Petitioner not only failed to reurge the only claim supported by pleadings in the trial court, i.e., that the IGA was an "employee organization," but failed to argue the claim that Sonny's had formed a single employer plan by obtaining insurance through the

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excerpt is clearly directed at Conclusion of Law No. 1, in which the trial court held that "[t]he transactions between the Insurance Trust, its employer members and Prudential were mere purchases of insurance." (Pet. App., C-9). Moreover, Petitioner's point of error in its state court appellate brief was predicated only upon the overruling of the Motion for Judgment N.O.V. Such a point of error raised only a question of law, and did not put at issue any fact findings. *Eubanks v. Winn*, 420 S.W.2d 648 (Tex. 1967). Even if Petitioner's appellate brief *had* been sufficient, the fact remained that it failed to request additional or amended findings following the trial court's entry of findings of fact. *Able v. Able*, 725 S.W.2d 778 (Tex. App. – Houston [14th Dist.] 1987, writ ref'd). Despite all of Petitioner's protestations to the contrary, it failed to preserve the right to contest the trial court's fact findings, and is not entitled to try its case *de novo* in this Court.

[8] Both parties' briefs to the Texas Fourteenth Court of Appeals have been filed as lodgings with the Court.

[9] Though Prudential would have the Court believe that the decision of the Texas Fourteenth Court of Appeals in this case will have far reaching impact on Federal law, this is untrue. Rule 90(i), Texas Rules of Appellate Procedure, states unequivocally that "[u]npublished opinions shall not be cited as authority by counsel or by a court."

IGA.[10] The *only claim asserted in Petitioner's application for writ of error to the Texas Supreme Court was that the IGA was an "employer" which established a multiple employer ERISA plan, a claim nowhere asserted in its trial pleadings.* Obviously unimpressed with these appellate shenanigans, the Texas Supreme Court declined to issue a writ and thus promote further "unnecessary litigation."

I.

REASONS FOR DISMISSAL FOR LACK OF JURISDICTION

It is Petitioner's burden to affirmatively demonstrate that this Court has jurisdiction over its claims. *Department of Mental Hygiene of Cal. v. Kirchner,* 380 U.S. 194 (1965). It has not met and cannot meet this burden. Due to Petitioner's perplexing and improper practice of changing its position at each level of the appellate process while wending its way to this Court, "the highest court [below] in which a decision could be had" – the Texas Supreme Court – *was never asked* to decide and never decided the federal questions "specially set up or claimed" in the Texas trial court. *See* 28 U.S.C. § 1257. Long standing precedent holds that in such a case, this Court lacks jurisdiction to consider such questions.

To determine what federal questions were "specially set up or claimed" within the meaning of 28 U.S.C. § 1257, the focus is upon the claims asserted in the trial court:

> [T]he proper time of setting up the claim is in the trial court, whenever that is required by the state practice in accordance with which the highest court of a state will not revise a judgment of the court below, on questions not therein raised.

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[10] The parties' briefs to the Texas Supreme Court have also been filed as lodgings by Brown.

Spies v. Illinois, 123 U.S. 131 (1887); *See also Mutual Life Ins. Co. v. McGrew*, 188 U.S. 291 (1903). Moreover, the decision of "the highest court in which a decision could be had" must be against the *same* federal claim "specially set up" in the trial court. *Spies*, 123 U.S. at 181; *See also Layton v. Missouri*, 187 U.S. 356 (1902).

A comparison of the arguments raised in Petitioner's Second Amended Answer in the trial court, its Brief to the Texas Fourteenth Court of Appeals, and its Application for Writ of Error to the Texas Supreme Court demonstrates beyond any doubt that Petitioner failed to request or obtain a decision from the highest court of Texas on the federal questions specially set up in the trial court:

COURT		CLAIMS ADVANCED BEFORE COURT
1. TRIAL COURT	(1)	The IGA was an "employee organization" which established a multiple employer ERISA plan.
	(2)	Sonny's was an "employer" which established a single employer ERISA plan.[11]
2. INTERMEDIATE APPELLATE COURT	(1)	The IGA was an "employer" which established a multiple employer ERISA plan.
	(2)	Sonny's was an "employer" which established a single employer ERISA plan.[12]

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[11] *See* Petitioner's Second Amended Answer. (Pet. App., 6-1 *et seq.*) Petitioner orally attempted to raise in the trial court a claim that the IGA was an "employer," but Petitioner concedes that in order to prevail on a claim in Texas Courts, one must *plead, prove, and obtain* findings upon the facts supporting the claim. (Pet., p. 61). Petitioner did *none* of these things, much less *all* of them.

[12] The latter claim was *ineffectively* raised in the intermediate court, because Petitioner's Second Point of Error to the

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3. HIGHEST COURT OF STATE	(1)	The IGA was an "employer" which established a multiple employer ERISA plan.[13]

The claim that Sonny's formed an individual plan was clearly *abandoned* in the intermediate court both by Petitioner's assignment of error to the Motion for Judgment N.O.V. *and* its failure to carry that complaint forward in its subsequent appeal to the Texas Supreme Court. With respect to that claim, Petitioner was in the same position it would occupy as if it had filed no application for writ of error at all. *See Banks v. State of California,* 395 U.S. 708 (1969) (a decision cannot be reviewed in this Court where the highest appellate court in the state had discretionary power to review it and no effort was made by the defeated party to have that court exercise review). This Court should not be left to speculate as to how the Texas Supreme Court would have decided that question had it been presented to it. *Stratton v. Stratton,* 239 U.S. 55 (1915). The Texas Fourteenth Court of Appeals' opinion simply cannot be viewed as a decision of the "highest court" on that claim.[14]

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Fourteenth Court of Appeals complained only of the trial court's ruling on its Motion for Judgment N.O.V. (*See* Appellant's Brief to Fourteenth Court of Appeals). That motion merely incorporated by reference the claims asserted in Petitioner's proposed fact findings and conclusions of law, which were that the IGA was an "employer" or "employee organization" which formed a *multiple employer* plan. (Pet. App., H1 *et seq.*) Hence, *at best,* only those claims could be raised in the intermediate court of appeals by the assignment of error; and the claim that the IGA was an "employer" was itself flawed because it was not supported by pleadings in the trial court.

[13] *See* Petitioner's Application for Writ of Error to the Texas Supreme Court. Nowhere did Petitioner urge that Sonny's was an "employer" which formed a single employer plan.

[14] Indeed, the opinion of the Texas Fourteenth Court of Appeals does not *address* the claim for the very reason that the question was not before it.

As for the claim that the IGA was an "employer" which formed a multiple employer plan, that claim was not "specially set up" in the trial court. *See Spies*, 123 U.S. at 187. Under Texas practice, claims not raised in the pleadings will not be reviewed on appeal. *Davis v. Campbell*, 572 S.W.2d 660 (Tex. 1978). When a party *specifically pleads* his claims or defenses – as Petitioner did in this case – he is limited to those specific claims or defenses. *Richardson v. First. Nat. Life Ins. Co.*, 419 S.W.2d 836 (Tex. 1967). Thus, under *Spies*, the claim was not "specially set up." *Spies*, 123 U.S. at 181. In short, neither of the two claims now asserted by Petitioner are properly before the Court.

II.

REASONS FOR CONFINING ANY REVIEW TO THE EVIDENCE INTRODUCED AT THE SEPARATE TRIAL ON ERISA PREEMPTION

It is beyond dispute that Petitioner tried its ERISA preemption claims to the trial judge sitting without a jury, well before the trial of Brown's claims took place. Yet, throughout its entire discussion of its preemption claims, Petitioner makes only one cryptic reference to the separate trial. Petitioner has buried even that slight acknowledgment in a footnote. (Pet., p. 7, n. 5).

Worse, Petitioner has set out the procedural history of the case in a manner that intentionally leaves the impression that its ERISA preemption claims were simultaneously at issue with Brown's claims, and that both were resolved at the same trial. (Pet., pp. 10-11). Petitioner's rather obvious purpose in creating this misimpression is to have this Court consider evidence introduced at the *subsequent* trial which the trial court would not and did not consider in connection with the *already adjudicated* preemption claims. Indeed, by its repeated citations to testimony not offered, admitted, or received at the trial of its preemption claims on January

17, 1989, Petitioner implicitly concedes both that its arguments cannot withstand scrutiny without reference to such extraneous evidence, and that the record of the separate trial on ERISA preemption is woefully insufficient to support the contentions it attempts to foist upon the Court as established, undisputed fact. The only evidence this Court should consider is that evidence that was available for the trial court to consider at the trial held on Petitioner's preemption claims – the deposition of Ms. Richey.

Under Texas law, the trial court's ruling on Petitioner's claim could not be attacked on appeal using evidence other than Ms. Richey's deposition. Evidence developed at the *subsequent* trial on Brown's claims was unavailable for such purposes:

> The appellate court will review the ruling of a lower court on the record that was before the lower court at the time the ruling was made, and will not as a rule consider matters outside the record.

5 TEX. JUR. 3d, *Appellate Review* § 648 (1980).[15]

Federal appellate courts have observed the same rule. *Frito-Lay, Inc. v. Willoughby*, 863 F.2d 1029 (D.C. Cir. 1988) (function of appellate court is to review the record before district court at time of decision, not the record at some later point). *Kirshner v. Uniden Corp. of America*, 842 F.2d 1074 (9th Cir. 1988) (evidence submitted to trial court

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[15] This rule is aptly illustrated in *Dorbandt v. Bailey*, 453 S.W.2d 205 (Tex. Civ. App. – Tyler 1970, writ ref'd n.r.e.). There, the trial court held a hearing on some of the issues presented in the case. Following the hearing, it handed down an interlocutory decision as to those issues. The case then proceeded to a jury trial on the remaining issues. On appeal, the party against whom the interlocutory judgment was rendered attempted – like Petitioner here – to attack that judgment with the testimony from the *subsequent* jury trial. The appellate court, citing the above rule, held that the judgment must stand or fall on the basis of the evidence before the court *at the time of its decision*. *Id.* at 208.

after decision could not be part of record on appeal, and should be stricken); *Heath v. Helmick*, 173 F.2d 156 (9th Cir. 1949) ("[t]he cause must be tried here upon the record made at the original trial").

No doubt cognizant of this rule, Petitioner refrained from relying upon testimony developed in the jury trial in its briefs to the *Texas courts*. Apparently, Petitioner's level of desperation in this, the forum of last resort, now compels it to venture well beyond the evidence all courts below were asked to consider.[16]

To consider evidence other than that before the trial court at the time the issues were decided is not a sensible exercise of appellate review. This is especially true where the trial court, as here, *granted Petitioner's own motion* to subject issues to separate trials for purposes of convenience and judicial economy. If the result from the first trial can be attacked with the record of the second trial, the entire procedure of employing separate trials is transformed into a vehicle for one party to unfairly receive a "second bite at the apple."

III.

REASONS FOR DENYING THE WRIT

The federal question Petitioner attempts to pose to this Court was *never* properly before the trial court or the

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[16] Petitioner did not dare refer the Texas appellate courts to either testimony from the jury trial or a hearsay *affidavit* offered post-trial since neither was properly before those courts on these issues. Now, Petitioner improperly cites throughout its Petition to this Court, not only to testimony from the jury trial on Brown's claims (*See*, Pet., p. 27; p. 29; p. 31; p. 31, n. 13; p. 32; and p. 37), but also the hearsay affidavit filed with the trial court after the court ruled against Petitioner from the bench. (F. Supp. Tr., 1173 *et seq.*). The trial court received the filing of the Affidavit with the admonishment that it would only be accorded such weight as allowed by

(Continued on following page)

Texas Fourteenth Court of Appeals because Petitioner failed to adduce evidence at the ERISA trial which would establish the facts that it repeatedly represents to this Court as true:

1. that Brown's employer *purchased* the insurance benefits; and
2. that Brown's employer *obtained the insurance by adopting or subscribing to a trust agreement.*[17]

On a record utterly insufficient to pose the question, Petitioner now asks the Court to decide:

> "Whether an *employer who provides insurance* for its employees *through a trust agreement* has established an employee welfare benefit plan as that term is defined under ERISA."

(Pet., pp. 16-17, emphasis added).

To substantiate that this is in fact a case in which an "employer provid[ed] insurance," Petitioner finds it necessary (due to the insufficiency of the evidence it introduced at the separate trial) to repeatedly refer to testimony from the *subsequent jury trial* that was not before the trial court, the Texas Fourteenth Court of Appeals, or the Texas Supreme Court for purposes of determining the preemption issues. (*See* Pet., p. 29; p. 31-p. 31 n. 13; p. 32; p. 37). To establish that this is a case in which the employer obtained insurance "through a trust agreement," Petitioner makes the following misrepresentations to this Court:

> "Here, the Insurance Trust was established and maintained by an employer . . . *because the Declaration of Trust was adopted by . . . Brown's employer, Sonny's Automatic Transmission Service.*"

(Pet., p. 29, emphasis added).

(Continued from previous page)

Texas law; i.e., none. Tex. R. Evid. 801. Brown invites the Court to review Petitioner's state court briefs which have been filed with the Court as lodgings, and compare the matters cited to those courts with that now cited to this Court.

[17] Even the testimony from the subsequent trial on Brown's claims that is improperly cited by Petitioner fails to support these claims.

> *"Brown derived all insurance benefits from his employer's adoption of the Insurance Trust . . . ,* thus, *as an "adopting member," Brown's employer established an individual "plan" under* ERISA . . . "

(Pet., p. 32, n. 14, emphasis added).

> "[I]t is apparent that *Sonny's,* as an employer, *established an employee welfare benefit "though its adoption of the Insurance Trust."*

(Pet., p. 37, emphasis added).

> *"Brown's employer expressed an intent, through subscription to the Insurance Trust, to provide benefits* on a regular and long term basis."

(Pet. p. 42, emphasis added). Such assertions are flatly contradicted by the trial court's findings of fact.[18] (*See* Pet. App., C4-C5).

The trial court, on the evidence submitted to it and on the claims Petitioner properly put before it, confronted and answered only this question: if an employee obtains insurance through his employer's involvement with a trade association of unrelated employers, does a multi-employer ERISA plan arise?[19] The court's answer was "no" – an answer in complete harmony with all the federal appellate decisions Petitioner cites as "conflicting" authority. The Texas Fourteenth Court of Appeals,

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[18] In Finding of Fact No. 6, the trial court specifically observed that "there is *no evidence* that Sonny's Automotive Transmission Service did adopt and subscribe to the Trust Agreement" and that Sonny's was "apparently not required to do so." (Pet. App., C4-C5, emphasis added).

[19] The fact that neither the trial court nor the Texas Fourteenth Court of Appeals was ever called upon to answer the question Petitioner now poses to this Court emphasizes all the more this Court's lack of jurisdiction under 28 U.S.C. §1257. "The purposes of the requirement that a federal question be raised in the state court plainly are not satisfied if one question is presented to the state court and a different question is presented to the Supreme Court." 16 C. WRIGHT, A. MILLER, *et al.,* FEDERAL PRACTICE AND PROCEDURE § 4022 (1977).

reviewing that decision in light of the evidence introduced at the trial and the undisputed fact findings before it, arrived at the same decision that any of its federal counterparts would have reached, given the same facts.

A. Federal Case Law Rejects The Notion That The IGA Constitutes An "Employer" For Purposes Of ERISA.

When it realized that the preemption claims stated in its trial pleadings were not convincing to the trial court, Petitioner attempted to orally raise the issue that the IGA was an "employer". This argument has no more merit than the claims that *were* "specially set up" in the trial court.

Though Petitioner represents that trade organizations such as the IGA have been "routinely held" to constitute "employers" for purposes of ERISA (Pet., p. 48), such claims have found no degree of judicial acceptance, much less "routine" approval.[20] Indeed, such claims have been summarily rejected. *See Gahn v. Allstate Life Ins. Co.*, 926 F.2d 1449 (5th Cir. 1991).

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[20] The only case dealing with a trade association that is cited for the proposition that insurance trusts are "routinely held" to be "employers" under ERISA is a case that briefly noted – without analysis and apparently because the issue was uncontested or stipulated – that the Association in that case was regulated by ERISA. *Twin City Pipe Trades Service Ass'n v. Fred Plaas Plumbing & Heating Co.*, 815 F.2d 58, 59 (8th Cir. 1987). That case did not *hold* that such associations are "employers" under ERISA. Likewise, *Minnesota Chamber of Commerce & Industry v. Hatch*, 672 F.Supp. 393 (D. Minn. 1987) (cited in Pet., p. 48) does not hold that such entities are ERISA *employers. To the contrary, the parties in the case stipulated* that the entity was governed by ERISA, and the Court merely accepted the stipulation. The other case cited by Petitioner, *California*

(Continued on following page)

The Second, Fifth, Seventh, and Eleventh Circuits have each rejected claims that entities such as the IGA may form a single ERISA plan by enrolling unrelated employees or employers into a single insurance trust. *Matthew 25 Ministries, Inc. v. Corcoran*, 771 F.2d 21 (2d Cir. 1985); *Gahn*, 926 F.2d 1449 (5th Cir. 1991); *Taggart Corp. v. Life & Health Benefits Administration, Inc.*, 617 F.2d 1208 (5th Cir. 1980), *cert. denied*, 450 U.S. 1030 (1981); *Wayne Chemical, Inc. v. Columbus Agency Service Corp.*, 567 F.2d 692 (7th Cir. 1977); *Donovan v. Dillingham*, 688 F.2d 1367 (11th Cir. 1982).

The only authority that Petitioner discusses at any length which addresses this question is *Insurance & Prepaid Benefits Trusts v. Marshall*, 90 F.R.D. 703 (C.D. Cal. 1981). However, that case rejected the notion that insurance trusts form single ERISA plans by insuring employees of employers in a particular trade, and actually supports the decision below.

Marshall stands for two propositions: (1) the insurance trust must, both in form and substance, be controlled by an "employer" as defined by ERISA; and (2) employers must, both in form and substance, establish or maintain the trust solely for the benefit of their

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Chamber of Commerce v. Simpson, 601 F.Supp. 109 (C.D. Cal. 1985), held merely that a trade association has associational standing to sue on behalf of its members. In the face of Petitioner's representation that "numerous cases . . . have held that a trade association, such as the IGA, may be considered as a cognizable group or association for purposes of ERISA" (Pet., p. 48, n. 17), it is most interesting to note that of the cases Petitioner discusses, *only one* squarely addresses the question. That case *flatly rejects* Petitioner's contentions. *Insurance & Prepared Benefits Trusts v. Marshall*, 90 F.R.D. 703 (C.D. Cal. 1981). Indeed, that court acknowledge that the "judicial and legislative rejection of multiple employer trusts" has been virtually unanimous. *Id.* at 705, citations omitted.

employees. *Marshall*, 90 F.R.D. at 705-7. Whether a trust is "established or maintained" . . . "for its participants" depends upon whether the *express terms of the trust document* limit participation to those who are qualified to participate under ERISA. *Id.*

The trust document at issue in *Marshall* defined "participating employer" as, *inter alia*:

> Any individual; employer, whether a corporation, partnership, or sole proprietorship; an association of employers; . . . [and] another trust fund established to provide benefits similar to those of this trust; . . .

Id. at 707, n. 6. The term "employee" was defined under the trust document as:

> Those persons in the service of a participating employer, including in the case of a sole proprietorship or partnership, the sole proprietor or the partners, to the extent provided by the Benefit Committee . . .

Id. Because the terms "employee" and "participating employer" as defined by the trust documents were overly inclusive in scope, the court concluded that the trust was not established or maintained "for its participants or beneficiaries." *Marshall*, 90 F.R.D. at 707. In so finding, the court distinguished the case before it from one in which ineligible participants were included in the plan through something other than over inclusiveness of the trust documents themselves. *Id.*

Under the *Marshall* analysis, the IGA Insurance Trust clearly does not qualify as an ERISA plan. The trust agreement in this case was executed in 1963, well before the enactment of ERISA. As the trial court found, it was never subsequently modified to comply with the requirements and standards of ERISA. (Pet. App., C5). *Cf. Marshall*, 90 F.R.D. at 704 (noting that the trust agreement in that case *was* modified).

The IGAIT trust agreement obviously suffers from the same over inclusiveness observed in *Marshall*. The trust document at issue here defines "employees" as follows:

> The term "employees" shall comprise employees of employers, and proprietors and partners whenever an employer is a proprietorship or a partnership, if such proprietors and partners are actively engaged in and devote a substantial part of their time to the conduct of the business of the employer, and the Trustees and their employees, if the Trustees have made arrangements to such effect with the insurance carrier.

(Pet. App., J2). With regard to who may "participate" in the trust (and thus *maintain* it) the trust document states:

> A corporation, proprietorship or partnership in the Trust may request participation in the insurance under a policy by submitting a request for such participation to the Trustees together with an initial payment determined by the Trustees on the basis of the insurance to be provided. If the requirements for the participation in the insurance under a policy are satisfied, the corporation, proprietorship or partnership shall be enrolled as a Subscriber to the Trust. . . . A corporation, proprietorship or partnership that is accepted as a Subscriber shall thereafter make payments on such dates and in such amounts as the Trustees shall require for providing the insurance under each policy and administering the Trust. . . . If permitted by the insurance carrier, the [International Garagemen's] Association may become a Subscriber and participate in the insurance under a policy on the same basis as other corporations. . . . If permitted by the insurance carrier, the Trustees may arrange with the insurance carrier that the Trustees, their employees, and the families of the Trustees and their employees, be insured under the policies.

(Pet. App., J4-J5). Moreover, at least one of the Trustees of the Trust, Mr. Allen Richey, was clearly *not* an employer engaged

in the automotive industry, but one employed as a magazine editor by the IGA itself. (Richey Depo., pp. 10, 24)[21]

Thus, neither element of the two pronged test utilized in *Marshall* is satisfied. In form, the Trustees were not, at the relevant time, representative of a cognizable group of employers, and the "participants" potentially eligible under the trust agreement were not limited to those persons qualifying as "participants" under ERISA.

Recognizing that the Trust Agreement is overexpansive by its inclusion of non-employers and non-employees, Petitioner relies upon the "qualifying" language in the Trust Agreement that limits the participation of such non-employees and non-employers to those "permitted by the insurance carrier," (Pet. App., J4-J5), and argues that "the group policy issued by Prudential requires that only employees who are engaged in the repair and servicing of automobiles may participate." (Pet., p. 48, n. 17). Under the Petitioner's own case authority, this observation is unavailing. Even in situations where in practice only persons eligible to participate in an ERISA plan were permitted to become participants of the trust, the fatal problem of an overly inclusive trust document is not corrected. *Marshall*, 90 F.R.D. at 707.

Moreover, this particular feature of the trust document militates against a finding that the Trust was "controlled" by its members. The evidence here shows that *Petitioner*, as

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[21] Petitioner now represents that "the five-member board of trustees of the Insurance Trust are all independent automotive service employers who belong to the IGA and have been active in the IGA since its inception," citing the deposition of Ms. Richey. The cited testimony is utterly irrelevant, since it establishes only that *at the time of Ms. Richey's deposition*, the Trustees *happened* to be employer members of the IGA. It does not change the fact that the Trust Agreement allowed virtually *anyone* to be appointed a Trustee, and that non-employers served as Trustees. Moreover, it sheds no light as to the identity of the Trustees at the *relevant time period*, i.e., when Sonny's obtained the insurance.

opposed to the IGA, controlled all of these essential operational functions of the Trust:

> (1) Disposition of "trust funds";
>
> (2) Determinations as to what corporation[s], proprietorships, partnerships should be enrolled in the Trust;
>
> (3) Determinations as to what employees, trustees, partners or proprietors would be allowed to claim insurance benefits through the trust;
>
> (4) The premiums to be charged for the insurance benefits; and
>
> (5) The amount of benefits to be paid to the employees, trustees, partners or proprietors allowed to obtain benefits.[22]

Thus, when Petitioner repeatedly asserts that the "employer members" of the trust were in "control" of the trust, it is

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[22] The "trust funds" were simply premium payments which were forwarded by the members to the IGA, and then forwarded by the IGA to Petitioner. Thus, to the extent there *were* any "trust funds," (*Cf.* FOF 9, Pet. App., C6), Petitioner had control over them. Petitioner admits that *it* controlled the next two operational aspects of the trust, by defining through the terms of its group policy what entities or individuals could be enrolled and what individuals would benefit. Indeed, the authority to control such matters was virtually ceded to the insurance carrier through the terms of the trust agreement, as Petitioner recognizes. As to the fourth function, the trial court found (and Petitioner did not contest) that it "made the sole determination of the premiums to be charged to the employers and the employers had no input into the operation or administration of the 'trust' or the selection of insurance." (Pet. App., C7). As to the fifth and final function, the evidence showed that all claims were paid with checks written on Petitioner's bank accounts, and that Petitioner made the ultimate decision as to how much to pay the employees in response to their insurance claims. (Richey Depo., p. 27). Indeed, it was Petitioner's bad faith exercise of this power that led to the judgment against it.

simply begging the question. Since Petitioner had possession and control of the "trust fund" and made the decisions as to the entities who could enroll, the persons who could benefit, the charges for the insurance, and the payments to the beneficiaries, there was nothing of substance left to be "controlled" by anyone.

Finally, Sonny's apparent failure to formally adopt the trust agreement negates the contention that there was a multiemployer plan as a matter of law. 29 C.F.R. § 2510-37(b)(i)(A); *See also Wayne Chemical, Inc. v. Columbus Agency Service Corp.*, 567 F.2d 692 (7th Cir. 1977). The fact that Sonny's was allowed to participate in the insurance program *without* adoption of the Trust (FOF 6; Pet. App., C4-C5) is a strong indication that the adoption of the Trust was regarded as a mere technicality that could be easily and readily disregarded.

B. Under Federal Case Law, Petitioner Failed To Establish That Sonny's Formed An Individual Benefit Plan Subject To ERISA.

The Employee Retirement Income Security Act of 1974 (29 U.S.C. § 1001 *et seq.*) applies only to plans established or maintained:

(1) By any employer *engaged in commerce or in any industry or activity affecting commerce;* or

(2) by any employee organization or organizations representing employees engaged in any industry or activity affecting commerce.

29 U.S.C. § 1003(a)(1) and (2). (Emphasis added). Thus, with reference to Petitioner's previously abandoned claim that Sonny's (as an "employer") formed an individual plan by subscribing to the trust, Petitioner must show that Sonny's was engaged in interstate commerce in order for ERISA to have even potential application to the "plan."

Petitioner attempts to clear this initial hurdle with an assertion that "Sonny's . . . uses interstate mail and telephone lines in performing services for IGA member's employers

in Texas and other states." (Pet., p. 60). This is a preposterous and flagrant fabrication. Nowhere in the record is there any indication that Sonny's used interstate mail and telephone lines.[23] The record is completely silent as to Sonny's involvement, *if any*, in interstate commerce. For this reason alone, Petitioner's claim that Sonny's formed an individual employee benefit plan must fail, because ERISA has no application whatsoever to a "plan" of any type formed by an employer not engaged in interstate commerce. 29 U.S.C. § 1003.

Further, Petitioner's representation that Sonny's purchased and provided insurance for "all" of its employees is a double barrelled misstatement of the record. *There was no evidence at the ERISA preemption trial that Sonny's purchased or provided any benefits, and no evidence that it had more than one employee for whom to purchase or provide insurance.* Once again, Petitioner substitutes unsubstantiated claims for record proof.[24]

The Seventh Circuit has held that securing insurance from a "multiple employer trust" does not establish an ERISA plan, unless the employer in question thereby *intends* to form a plan. *Wayne Chemical*, 567 F.2d at 698-700. The evidence supplied by Petitioner does not satisfy this test, since the record is silent as to Sonny's purpose in becoming involved with the IGA insurance program.

The Fifth Circuit has posited a two-pronged test to be used in determining whether securing insurance benefits from a multiple employer trust constituted the formation of an ERISA plan (assuming, of course, that the requisite nexus with interstate commerce is first established). *Gahn*

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[23] Similarly, there is no evidence whatsoever that Sonny's used such instrumentalities to perform services for the intrastate and interstate members of the IGA.

[24] Petitioner itself recognized the utter lack of evidence to support such a claim, as demonstrated by the fact that it declined to propose any fact findings or conclusions of law to support it in the trial court.

v. Allstate Life Insurance Co., 926 F.2d 1449, 1452 (5th Cir. 1991). Under the analysis suggested by *Gahn*, it must first be established that the "safe harbor provision" prescribed by administrative regulation does *not* apply. *Id.*, *citing* 29 C.F.R. § 2510.3-1(j) (1990). Under that rule, the insurance arrangement is *not* a statutory plan if (1) the employer did not contribute to the plan (2) participation in the plan was voluntary; (3) the employer's involvement in the plan was limited to collecting and forwarding premiums; and (4) the employer received no profit from administering the plan. *Id.*, at 1452. If all of these criteria are applicable, the plan is clearly *not* subject to ERISA. If one or more of these criteria are *not* applicable, then the plan is potentially subject to ERISA. *Id.*

In this case, Petitioner failed to distinguish its group insurance program with the IGA from those that are clearly *not* subject to ERISA under the Department of Labor regulations. At the separate trial on ERISA preemption, Petitioner failed to adduce evidence that Brown's employer contributed to the plan, or that Brown's participation was anything but voluntary. Petitioner also failed to come forward with evidence that Sonny's had any role with reference to the plan other than forwarding payments to a purveyor of insurance. Finally, it submitted no evidence that Sonny's was involved with or profited through the administration of the plan. The deposition of Ms. Richey, which was the sole evidence Petitioner offered at the ERISA preemption trial, simply focused upon the *wrong entity* – the IGA. *See Gahn*, 926 F.2d at 1452.[25]

Federal appellate courts have repeatedly emphasized that the existence of an ERISA plan is inherently a *question of*

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[25] There is virtually no evidence in the record of the separate ERISA trial concerning Sonny's. There were three related persons at Sonny's having some sort of insurance coverage through the IGA. (Richey Ex. 11). However, since the trust in question permitted employees as well as partners and proprietors to participate, it is wholly unclear whether the two persons, other than Brown, who obtained insurance through IGA were employees of, owners of, or partners in this business.

fact. Gahn v. Allstate Life Insurance Co., 926 F.2d 1449 (5th Cir. 1991); *Wickman v. North Western Nat'l Insurance Co.*, 908 F.2d 1077 (1st Cir.), *cert. denied*, ___ U.S. ___, 111 S.Ct. 581 (1990); *Kanne v. Connecticut General Life Ins. Co.*, 867 F.2d 489 (9th Cir. 1988), *cert. denied*, 492 U.S. 906 (1989). Petitioner was required to ensure that sufficient facts were developed at the separate ERISA preemption trial to support its arguments on appeal. It did not do so. Hence, it is now required to bear the consequences of any incompleteness in the record on the factual issues it raised. *See Andersen v. Cumming*, 827 F.2d 1303 (9th Cir. 1987).

Petitioner's arguments are constructed upon a foundation of misrepresentations of the record and evidence wholly outside the record of the separate trial on ERISA preemption. This Court should not allow misstatements of the facts and evidence outside the record to substitute for the proof for which Petitioner was responsible.

C. Even If Petitioner Had Established Its Preemption Claims, The Judgment Against It Would Remain Intact.

Petitioner has argued that only *two* consequences should flow from the alleged preemption of Brown's claims: (1) his claims should be dismissed because he purportedly failed to plead facts sufficient to support an ERISA claim; and (2) the jury verdict in his favor should be disregarded, because he purportedly was not entitled to a jury trial. Petitioner has *not* urged any other further "consequences" which follow from the alleged preemption or identified any further "defects" in the proceedings below. Because neither of these two "consequences" would result from the alleged preemption of Brown's claims, any holding that ERISA applied would be academic in nature and have *no effect* on the judgment.

Under Texas practice, a Plaintiff's pleading need only allege the ultimate facts constituting the elements of a cause of action. *Arkansas Fuel Co. v. State*, 154 Tex. 573, 280 S.W.2d 723 (1955). All that is required of a pleading is that it give fair notice to the defendant of the proof that will be introduced against it at trial. *Osteen v. Crumpton*, 519 S.W.2d 263

(Tex. Civ. App. – Dallas 1975, writ ref'd). Brown's pleadings stated that certain benefits were due to him from Petitioner under the terms of an insurance policy, and that Petitioner, who issued the policy, refused to pay the benefits due without reasonable basis. (F. Supp. Tr., 78). The jury findings confirmed the validity of these claims. These claims and the ensuing findings supported recovery under either state law *or* ERISA. *Firestone Tire and Rubber Co. v. Bruch*, ___ U.S. ___, 109 S.Ct. 998 (1989). Petitioner's claim that Brown's pleadings were insufficient was based solely upon the misguided belief that Brown would have to allege an "abuse of discretion" on Petitioner's part. This notion was squarely rejected in *Firestone*, 109 S.Ct. at 956.[26]

Further, nothing in ERISA prohibits state courts from conducting jury trials, even in situations – unlike this case – where the claims at issue *are* governed by ERISA. The Federal cases which have held jury trials to be unavailable in ERISA actions tried in federal court have done so by reasoning that the insured's decision was to be reviewed under an "arbitrary and capricious" standard rather than a *de novo* standard,[27] and such a case, sounding in *equity*, is not within the *Seventh Amendment* guarantee of trial by jury. (*See Calamia v. Spivey*, 632 F.2d 1235 (5th Cir. 1980). These cases are irrelevant. The *Texas Constitution* guarantees trial by jury. It does not observe any distinction between actions at law and

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[26] The very case Petitioner *now* cites in support of the claim that Brown's pleadings and jury findings were insufficient was a *pre-Firestone* case that rejected the sufficiency of the pleadings and findings on the sole basis that no "abuse of discretion" was pleaded and found – an element subsequently rendered unnecessary by *Firestone*. *See Felts v. Graphic Arts Employee Benefits Trust*, 680 S.W.2d 891, 894 (Tex. App. – Houston [1st Dist.] 1984, no writ). The other Texas case cited by Petitioner for a different point, *Cathey v. Metropolitan Life Ins. Co.*, 805 S.W.2d 387 (Tex. 1991), was obviously one in which the pleadings were *not* sufficient to state an ERISA claim, and there were *no* findings to support such a claim.

[27] As noted, this premise has since been rejected by this Court. *Firestone Tire and Rubber Co. v. Bruch*, 109 S.Ct. at 956.

actions in equity. *State v. Credit Bureau of Laredo*, 530 S.W.2d 288 (Tex. 1975); TEX. CONST. ART. 1, § 15. It is axiomatic that if a state wishes to provide more extensive constitutional guarantees than that provided in the Federal Constitution, it is free to do so. Moreover, conducting jury trials on claims tried in state court cannot conceivably conflict with anything found in the ERISA statute.

Thus, even if Petitioner had established its preemption claims by proper pleadings, sufficient proof, and adequate findings, the result would have been the same. Its *only complaints* were that Brown's pleadings and the supporting jury findings were "insufficient," and that Brown's case was tried to a jury. Since both complaints were without merit, the judgment would have been affirmed below even if ERISA was found to have applied to Brown's claims.

CONCLUSION

WHEREFORE, Billy W. Brown, Respondent, prays that the Petition for Writ of Certiorari requested by Prudential Insurance Company of America be dismissed for want of jurisdiction. Alternatively, Brown prays the Court decline to issue a Writ of Certiorari to the Texas Fourteenth Court of Appeals. Finally, should the Court grant Petitioner's Petition for Writ of Certiorari, Brown prays the Court affirm the judgments of the 151st District Court and the Fourteenth Court of Appeals.

Respectfully submitted,

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No. 90-1884

In The

Supreme Court of the United States

October Term, 1991

PRUDENTIAL INSURANCE COMPANY OF AMERICA,

Petitioner,

v.

BILLY W. BROWN,

Respondent.

Petition For A Writ Of Certiorari To The Texas Court Of Appeals For The Fourteenth Supreme Judicial District

RESPONDENT BILLY W. BROWN'S APPENDIX

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No. 81-31687

BILLY W. BROWN	§	IN THE DISTRICT
VS.	§	COURT OF HARRIS
	§	COUNTY, TEXAS
PRUDENTIAL INSURANCE COMPANY OF AMERICA	§	151ST JUDICIAL
	§	DISTRICT

DEFENDANT PRUDENTIAL INSURANCE COMPANY OF AMERICA'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW ON ERISA

TO THE HONORABLE JUDGE OF SAID COURT:

The Prudential Insurance Company of America ("Prudential"), the defendant, files the attached proposed findings of fact and conclusions of law in connection with the separate trial of ERISA preemption.

Respectfully submitted,

WEIL, GOTSHAL & MANGES

By /s/ _____

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Certificate of Service

I hereby certify that a true copy of the foregoing has been hand delivered to all counsel of record on this 18th day of January, 1989.

/s/ _____
William J. Dyer

brown.12

No. 81-31687

BILLY W. BROWN	§	IN THE DISTRICT
	§	COURT OF HARRIS
VS.	§	COUNTY, TEXAS
PRUDENTIAL INSURANCE	§	
COMPANY OF AMERICA	§	151ST JUDICIAL
	§	DISTRICT

FINDINGS OF FACT AND CONCLUSIONS OF LAW ON ERISA PREEMPTION

BE IT REMEMBERED that pursuant to the Agreed Order dated January 17, 1989, the Court, on the same date, conducted a separate trial, *in limine*, to determine disputed issues of fact relating to Defendant The Prudential Insurance Company of America's affirmative defense that the state-law claims of Plaintiff Billy W. Brown ("Mr. Brown"), as pleaded in Plaintiff's Second Amended Original Petition and Plaintiff's Third Amended Original Petition, are preempted pursuant to the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.* Based on the evidence adduced at that separate trial, the Court makes the following findings and conclusions:

FINDINGS OF FACT

1. Prudential issued a policy of group insurance to the Independent Automotive Service Association Insurance Trust ("Insurance Trust").

2. The Insurance Trust was established in 1964 by the officers of the Independent Garagemen's Association of Texas ("IGA") (later known as the "Independent Automotive Service Association" and as the "Automotive Service Association"), through a written agreement and Declaration of Trust ("Declaration of Trust") (Richey 10; Richey Ex. 2).

3. Sonny's Automatic Transmission Service, Inc., Mr. Brown's employer, provided health insurance to its employees through the IGA and the Insurance Trust.

4. At all material times to this lawsuit, Mr. Brown was a member of the group insured by the Prudential policy.

5. At all material times to this lawsuit, the Insurance Trust provided medical and life insurance coverage for the employees of the members of the IGA, such as Mr. Brown.

The Insurance Trust is an Employee Benefit Plan

6. The Insurance Trust has filed the Declaration of Trust (Richey Ex. 2) and other documents with the United States Government for the purpose of complying with ERISA; the Insurance Trust considers the Declaration of Trust to be "the plan" for purposes of ERISA. (*See* Richey 17-18 and Richey Ex. 1.) The Insurance Trust is not aware

of any other formal written plans prepared in connection with the requirements of ERISA. (Richey 40-41.)

7. *Intended Benefits.* Article I of the Declaration of Trust identifies the intended benefits of the Insurance Trust as being the provision of "life and accident and health insurance" through "one or more group policies issued by insurance carriers." (Richey Ex. 2, p. 1.)

8. *Intended Class of Beneficiaries.* Article I also identifies the intended class of beneficiaries of the Insurance Trust as being "employees of employers and members of families of employees," and requires that such "employees" be "actively engaged in and devote a substantial part of their time to the conduct of the business of the employer." (Richey Ex. 2, p. 1.)

9. *Source of Financing.* Articles III and IV of the Declaration of Trust also establish the source of financing for the Insurance Trust (payments of subscribers to the fund, contributions required of employees of subscribers, etc.), and the proper uses of the funds held by the Insurance Trust (to pay expenses, pay premiums, make investments, make refunds, etc.). (Richey Ex. 2, pp. 2-3.)

10. *Procedures for Receiving Benefits.* Article II of the Declaration of Trust authorizes the trustees of the Insurance Trust to procure suitable insurance policies; "to take any action with respect to each policy or the insurance provided thereunder permitted by the insurance carrier"; and to agree with insurance carriers that a representative of the trustees may "sign drafts upon the insurance carrier in the amounts approved for the payment of claims under a policy," thereby facilitating "short method claim

administration." (Richey Ex. 2, pp. 1-2). Article III, section 4 authorizes the trustees to "adopt such rules and regulations including any requirements for eligibility of Subscribers for participation in the Trust and require the Subscribers to furnish such information as the Trustees deem necessary or advisable." (Richey Ex. 2, p. 3.) Through these provisions, Article II generally establishes the procedures for receiving benefits under the Insurance Trust. The Insurance Trust communicates those procedures more specifically to the IGA members and their employees at least in part through providing them with "plan booklets" provided by the insurance carrier, which include benefit schedules and procedures for making and appealing claims. (Richey 75-76; *see* Richey Ex. 12.)

11. The Declaration of Trust also contains, in Article VII, provisions for its amendment and termination. (Richey Ex. 2, pp. 5-6.)

12. In connection with the Prudential policy, the Insurance Trust performed administrative duties, such as sending out billings, accepting premium payments, paying claims, and keeping records. (Richey 27-28; *see, e.g.*, Richey Ex. 11, the invoice to Mr. Brown's employer for premiums; Richey Ex. 3, the enrollment card for Mr. Brown; and Richey Ex. 14, the claims filed for Mr. Brown.) The Insurance Trust considers itself to be what is commonly termed a "third party administrator" (Richey 27).

13. Prudential, as an insurer, was provided by the Insurance Trust with a membership list of IGA members, and solicited employees of IGA members from that list (rather than soliciting to the general public or to automobile repair businesses which were not already IGA members). (Richey 14.)

14. The Insurance Trust is therefore a plan, fund, or program established or maintained by the IGA for the purpose of providing the employees of IGA members with medical, surgical, or hospital care benefits.

15. Neither the IGA nor the Insurance Trust was established by individual employees or by entrepreneurial businesses; they do not operate for purposes of making a profit. (Richey 88-89.)

16. Working with the insurance carrier it has selected, the Insurance Trust files an Annual Report to the U.S. Government on Form 5500, which forms purport to be filed under section 104 of ERISA, 29 U.S.C. § 1024. These forms all identify the "plan" as the Independent Garagemen's Association Insurance Trust, and state that the effective date of the plan was 1964 (the year in which the Declaration of Trust was executed). (Richey Ex. 5-9.) The Insurance Trust also provides participants with Summary Annual Reports each year, which also purport to be provided "as required under [ERISA]." (Richey Ex. 10). These reports and summaries generally comply with the regulations established by the Department of Labor in 29 C.F.R. part 2520.

17. The Insurance Trust believes itself to be subject to the provisions of ERISA, and would not undertake the trouble and expense of complying with federal reporting regulations if it did not so believe. (Richey 93-94.)

The IGA Acts Indirectly in the Interest of the Employers

18. Membership in the IGA is limited to independent automotive repair shops in the United States and

several foreign countries. Although a broad range of automobile repair services are performed by the IGA members, only those who are somehow in the business of repairing automobiles are eligible for membership. (Richey 33-34, 48-50.)

19. Only employees of IGA members can obtain insurance through the Insurance Trust. (Richey 33-34, 43; Richey Ex. 2.)

20. As a condition for obtaining insurance for their employees through the Insurance Trust, the IGA members had to adopt or ratify or execute the Declaration of Trust for the Insurance Trust (Richey 37; Richey Ex. 2).

21. A four-member board of trustees, who are all independent automotive service people, oversees the entire operation of the Insurance Trust. (Richey 31-32, 89; Richey Ex. 2.) The Trustees are all independent garagemen who have been active in IGA work "throughout the years." (Richey 32.) They receive no remuneration. (Richey 33.)

22. One example of the supervision and control of the Insurance Trust by the Trustees was the decision to switch from Prudential to another insurer. (Richey 41.)

23. The IGA may remove any trustee of the Insurance Trust from office at any time by a simple written instrument delivered by the IGA to all Trustees. The IGA may also appoint successor Trustees by delivering a written instrument to all Trustees. (Richey Ex. 2, at p. 4, art. V, §§ 4-5.) Through these provisions, the IGA – and therefore, its employer members – indirectly control, and have indirect responsibility, for the Insurance Trust and its

acquisition of health insurance for the IGA members' employees.

The IGA is Also an "Employee Organization"

24. Both the IGA members and their employees participate in the IGA – by receiving IGA newsletters, attending IGA conventions, and like activities typical of those conducted by trade associations. (Richey 84-85.)

25. Also, through their communications with the IGA and the Insurance Trust regarding the health insurance coverage they have obtained through the Insurance Trust, the employees of the IGA members participate in the IGA and the Insurance Trust. (*See, e.g.*, Richey 42, 78, 82-83; Richey Ex. 14, communications with Mr. Brown and his attorneys.)

26. The Insurance Trust deals with employers concerning the Insurance Trust and other matters incidental to employment relationships, like health insurance. (Richey 87.) For example, the Insurance Trust collects premiums (*see* Richey Ex. 11) and enrollment cards (*see* Richey Ex. 3) from employers.

The IGA and Insurance Trust Affect Interstate Commerce

27. Both the IGA and the Insurance Trust have used the interstate mails and telephone lines in performing services for the IGA members' employees in Texas and other states. (Richey 46, 89-91.) Accordingly, both the IGA and the Insurance Trust operate in, and have an effect upon, interstate commerce.

CONCLUSIONS OF LAW

1. The IGA is an "employer" under 29 U.S.C. § 1002(5) because it is a "person" (within the meaning of 29 U.S.C. § 1002-(9)) acting "indirectly in the interest of an employer [e.g., Sonny's Automotive] in relation to an employee benefit plan." *See Income Security Corp., Inc., et al. v. Louisiana Oilfield Contractors Assoc., Inc.*, No. CV86-1664 (W.D. La. 1987) (Louisiana Oilfield Contractors Association (LOCA), a corporate association of employers that acted in the interest of the employers in creating, administering, and operating the LOCA Plan, was an "employer" under ERISA.)

2. The IGA is also an "employee organization" under 29 U.S.C. § 1002(4) because it is an organization "in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning an employee benefit plan, or other matters incidental to employment relationships." *See Income Security Corp. v. Louisiana Oilfield Contractors Association, Inc.*, No. CV86-1664 (W.D. La. 1987) (LOCA Trust, a tax-exempt entity under the Internal Revenue Code, was an "employee organization" under ERISA).

3. A trade association, such as the International Garagemen's Association, can establish an employee welfare benefit plan under 29 U.S.C. § 1002(1), and a number of courts have explicitly or implicitly so held. *See, e.g., Twin City Pipe Trades Service Association v. F. Plass Plumbing & Heating Co.*, 815 F.2d 58, 59 (8th Cir. 1980) (dismissal of appeal of district court's order granting Twin City's petition to conduct an audit of the employer's records

wherein the Twin City Association was a nonprofit corporation managed by employers and employees in "the plumbing and pipefitting industry" that had established a multi-employee benefit agreement under ERISA); *Minnesota Chamber of Commerce & Industry v. Hatch*, 672 F. Supp. 393 (D. Minn. 1987) (state law was preempted by ERISA where plaintiff was association whose members provided health benefit plans to their employees, and parties to lawsuit agreed that the plaintiffs' members provided health benefit plans subject to ERISA); *Income Security Corp v. Louisiana Oilfield Contractors Association*, No. CV86-1664 (W.D. La. Sep. 28, 1987) (health care and major medical benefits trust established by employer association was ERISA employee welfare benefit plan, since plan operated under trust agreement and summary plan description in order to provide benefits for employees of association's member companies and their dependents, and since agreement was written to conform with ERISA requirements for providing benefits to intended beneficiaries and source of financing and trustees responsibilities, and since it provided benefits schedule, statement of rights, and claims procedure); *California Chamber of Commerce v. Simpson*, 601 F. Supp. 104, 106 (C.D. Cal. 1985) (California Labor Commissioner was enjoined from enforcing state law and procedures with respect to severance benefit plans because such laws and procedures were preempted by ERISA; California Chamber of Commerce, a non-profit corporation, was a "statewide membership trade association made up of business members," and both "[i]t and its members are ERISA 'employers' "); *Southeastern Lumber Manufacturers Association, Inc. v. Walthour Agency, Inc.*, 486 F. Supp. 781 (N.D.

Ga. 1980) (federal court had subject matter jurisdiction under pendant jurisdiction doctrine over malpractice claims against accountants and accounting firm in lawsuit where a valid claim under ERISA had been pleaded by lumber manufacturers association that created voluntary employee benefit plan and trust pursuant to ERISA).

4. Pre-ERISA, an employee benefit plan was distinguishable from insurance in that "most" employee benefit plans were "non-profit, non-advertising, and provided by employers, or pre-exiting [sic] employee groups." *Bell v. Employee Security Benefit Association*, 437 F. Supp. 382, 390 (D. Kan. 1977). Pre-ERISA, an "employees' beneficiary association" under the Welfare and Pension Plans Disclosure Act, as amended by the Welfare and Pension Plans Disclosure Act Amendments of 1962, 29 U.S.C. § 302(a)(3), was defined by the Department of Labor as one where "membership in the association must be conditioned on one's employment status," e.g., limited to employees of a specific employer or employers, or members were required to be members of one union. *Bell*, 437 F. Supp. 382, 395, *citing* Department of Labor, *The Welfare and Pension Plans Disclosure Act Interpretive Manual*. Accordingly, because of the nonprofit nature of the IGA and the Insurance Trust, and the limitation on participation in them to those engaged in the automobile repair industry, the Insurance Trust was an "employee benefit plan" even as that term was understood prior to the passage of ERISA in 1974.

5. The IGA and the Insurance Trust are clearly distinguishable from the "employers" or "employee organizations" at issue in *Taggart Corp. v. Life & Health Benefits Administration, Inc.*, 617 F.2d 1208 (5th Cir. 1980), *on appeal*

from Taggert Corp. v. Efros, 475 F. Supp. 124 (S.D. Tex. 1979), *cert. denied*, 450 U.S. 1030 (1981). The "trust" in *Taggart* was a proprietary enterprise, established and operated by independent businessmen for their personal profit; it acted as a mere conduit for hundreds of unrelated subscriber customers for which it forwarded premium payments to a group insurer; no employer participated in either the "trust's" day-to-day operation or administration. 617 F.2d at 1210. The district court's opinion in *Taggart* also reveals that there were subscriptions to the plan directly by employees without the knowledge of their employers, and that the "trust" was intended to be an actuarially sound profit-making enterprise, which put it "outside the traditional concept of an employee benefit plan." 475 F.Supp. at 126, 127. Finally, the single employer – Taggart Corp. – was argued by the Secretary of Labor to have established a "single employer welfare plan" by subscribing to the "trust"; but the Taggart Corp.'s "plan" was a "bare purchase of insurance," 617 F.2d at 1211, that benefited only Taggart's president and his family, 475 F.Supp. at 127. None of these facts exist in the case of the IGA and the Insurance Trust.

6. Indeed, *Taggart* has been interpreted to be "limited [in] its holding to those situations in which 'the purchasing employer neither directly or indirectly owns, controls, administers or assumes responsibility for the policy or its benefits.' " *Davis v. Time Insurance Co.*, 696 F. Supp. 1317, 1320 (S.D. Miss. 1988) (quoting *Taggart*, 617 F.2d at 1211). *See also Donovan v. Dillingham*, 668 F.2d 1367, 1375 (11th Cir. 1982) (en banc) (disagreeing with *Taggart* "if [it] implies that an employer or employee

organization that only purchases a group health insurance policy or subscribes to a [multi-employer trust] to provide health insurance to its employees or members cannot be said to have established or maintained an employee welfare benefit plan").

7. The IGA's and the Insurance Trust's observance of ERISA's formalities also distinguish this case from those such as *Jordon v. Reliable Life Insurance Co.*, 694 F. Supp. 822 (N.D. Ala. 1988), where there was no written document meeting the requisites of 29 U.S.C. § 1102, and such documentation as there was did not provide for fiduciaries with authority to control and manage the plan, or a procedure for establishing and carrying out a funding policy, or a procedure for the allocation of responsibilities for the operation and administration of the plan. The Insurance Trust's Declaration of Trust in this case satisfies all of these requirements.

8. Similarly, the case at bar is clearly distinguishable from *Bell v. Employee Security Benefit Association*, 437 F. Supp. 382 (D. Kan. 1977), in which the Employee Security Benefit Association's (EBSA) plan was found to be "insurance" and not an "employee welfare benefit plan" because EBSA was organized by third party entrepreneurs to market insurance products or other services, its members were employees from a variety of occupations with no commonality of interests, it solicited and marketed members through insurance agencies, it was not a non-profit entity, and employers did not necessarily know if their employees had purchased an EBSA policy.

9. Under the literal terms of 29 U.S.C. § 1002(1), the Insurance Trust is an "employee welfare benefit plan"

because it was "established [and] maintained by an employer or by an employee organization or by both [as is true of the IGA] . . . for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits. . . . " Under the judicial gloss on the statute, the Insurance Trust also qualifies as [sic] "employee welfare benefit plan" under 29 U.S.C. § 1002(1) because it (1) is "provided by an employer or homogeneous employee organization"; (2) is "non-commercial in nature"; (3) does "not involve solicitation"; (4) is "not intended to be actuarially sound"; and (5) is able to provide rates "substantially lower than insurance rates." *Bell*, 437 F. Supp. 382, 391 (discussing post-ERISA Congressional intent as set forth in Activity Report of the Committee on Education and Labor of the U.S. House of Representatives, H.R. 94-1785 (1976)).

10. The Insurance Trust also qualifies as a "plan, fund, or program" under ERISA because the Declaration of Trust and the surrounding circumstances would allow a reasonable person to "ascertain the intended benefits, a class of beneficiaries, the source of financing, and procedures for receiving benefits." *E.g., Donovan v. Dillingham*, 688 F.2d 1367, 1373 (11th Cir. 1982) (en banc).

11. The Insurance Trust is also an "employee welfare benefit plan" because

> the intended benefits [are] health . . . benefits; the intended beneficiaries [are] . . . employees, former employees or their beneficiaries; and an employer or employee organization, or both, and not individual employees or entrepreneurial businesses, must establish or maintain the plan, fund, or program.

Id. Accord, Ed Miniat, Inc. v. Globe Life Insurance Group, Inc., 805 F.2d 732, 738-39 (7th Cir. 1986), *cert. denied*, 107 S. Ct. 3188 (1987); *Davis v. Time Insurance Co.*, 696 F. Supp. 1317, 1319 (E.D. Miss. 1988).

12. There is "no requirement of a formal, written plan in either ERISA's coverage section or its definitions section"; and although ERISA's "fiduciary and reporting provisions require that the plan be [sic] established written instrument, . . . clearly these are only the responsibilities of administrators and fiduciaries of plans covered by ERISA and are not prerequisites to coverage under the Act." *E.g., Donovan*, 688 F.2d at 1372. Nonetheless, the Declaration of Trust for the Insurance Trust – because it meets all of the requirements set forth in *Donovan* and similar cases – is wholly adequate to serve as a written "plan, fund, or program" within the meaning of ERISA.

13. As an "employee welfare benefit plan," the Insurance Trust is also, by definition, an "employee benefit plan" under 29 U.S.C. § 1002(3).

14. Under 29 U.S.C. § 1003(a), ERISA applies to the Insurance Trust because it is an "employee benefit plan" that was "established or maintained" by an [sic] both an "employer" and an "employee organization" engaged in commerce or in an industry or activity affecting [interstate] commerce."

15. ERISA "supersede[s] any and all state laws insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C. § 1144(a).

16. All of the state-law claims pleaded by Mr. Brown in Plaintiff's Second Amended Petition and Plaintiff's Third Amended Original Petition are therefore preempted by ERISA. *E.g., Pilot Life Insurance Co. v. Dedeaux*, 107 S. Ct. 1549 (1987); *Metropolitan Life Insurance Co. v. Taylor*, 107 S. Ct. 1542 (1987); *Juckett v. Beecham Home Improvement Products, Inc.*, 684 F. Supp. 448 (N.D. Tex. 1988) (Sanders, J.) (preemption of claims under Texas law); *Cathey v. Metropolitan Life Insurance Co.*, No. 01-88-00046-CV (Tex. App. – Houston [1st Dist.] Dec. 22, 1988, no writ) (ERISA preempts claims under Texas laws for breach of contract, "bad faith" claims handling, breach of implied covenant of good faith and fair dealing, 12% penalty under Ins. Code art. 3.62, DTPA, and Ins. Code art. 21.21).

17. The Court therefore finds that Plaintiff's Second and Third Amended Original Petitions should be stricken, but that in the interests of justice, Mr. Brown should be afforded an opportunity to replead to allege claims under ERISA. The Court will enter an appropriate separate order to that effect.

SIGNED on this ___ day of January, 1989.

JUDGE PRESIDING